RECORD AND BRIEFS

No. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,
Petitioners

V.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondents

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF CHRISTIAN LEGAL SOCIETY, CENTER FOR PUBLIC JUSTICE, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE LUTHERAN CHURCH—MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, QUEENS FEDERATION OF CHURCHES, RABBINICAL COUNCIL OF AMERICA, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses the question whether compelling petitioner to create a cake to celebrate a wedding, which he understands to be an inherently religious event, violates the Free Exercise or Establishment Clauses.

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INTEREST OF *AMICI CURIAE*[1]

Amici are religious organizations who accept that same-sex civil marriage is the law of the land. But some deeply religious Americans, including some of amici's members, cannot in good conscience assist with same-sex weddings. Now that the Court has protected the liberty of same-sex couples, it is equally important to protect the religious liberty of these conscientious objectors.

Most of these amici are involved in ongoing efforts, mostly unsuccessful so far, to negotiate legislation prohibiting sexual-orientation discrimination while providing religious exemptions. Amicus The Church of Jesus Christ of Latter-day Saints played a key role in passing such legislation in Utah. 2015 Utah Session Laws chapters 13, 46. Amicus National Association of Evangelicals supported the version of the Employment Non-Discrimination Act that passed the United States Senate in 2013. S.815 in the 113th Congress. Amici chose to retain counsel who have repeatedly urged this Court to protect same-sex marriage and urged state legislatures to enact it. *See, e.g.*, Brief of Douglas Laycock, Thomas C. Berg, and others as Amici Curiae in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Laws protecting the liberty of both sides are extremely difficult to enact in our polarized political environment; too many on each side resist liberty for

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[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. The consents of petitioners and the Colorado Civil Rights Commission are on file with the Clerk; the consent of the individual respondents is submitted with the brief.

the other. These amici believe that religious liberty is a God-given right, that it reduces human suffering, and that it is an essential means by which people with deep disagreements live together in peace. A fundamental purpose of the Constitution is to protect the liberty of both sides, and especially so when powerful factions seek to deny that liberty. Additional details about individual amici are in the Appendix.

SUMMARY OF ARGUMENT

I. In its decision protecting the right of same-sex couples to marry, this Court affirmed that "[t]he Constitution promises liberty to all within its reach," allowing "persons, within a lawful realm, to define and express their identity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

Now this Court must hold that religious dissenters from same-sex marriage have the same liberty to live consistently with their identity. An individual who provides personal services like the creation of customized cakes should not be required to create them for an event—a wedding—that he believes is inherently religious, and that he believes is sinful because it conflicts with the fundamental nature of marriage as ordained by God. This brief is an appeal to protect these conscientious objectors as well as same-sex couples—to enforce the proposition that "[t]he Constitution promises liberty to all within its reach." *Id.*

The classic American response to deep conflicts like that between gay rights and traditional religious faith is to protect the liberty of both sides. The very arguments that underlie protection of same-sex marriage also support strong protection for religious liberty. Religious believers and same-sex couples each

argue that a fundamental component of their identity, and the conduct that flows from that identity, should be left to each individual, free of all nonessential regulation.

II.A. This case is about assisting with a wedding. It does not involve any alleged right to generally refuse service to same-sex couples, or to act on conscience in purely commercial contexts. It involves a right to act on conscience in a religious context—in connection with a wedding.

B. Petitioner believes that a wedding is an inherently religious event, and that a same-sex wedding is religiously prohibited. Colorado demands that he assist in celebrating such a wedding. This demand burdens his free exercise of religion. Colorado's countervailing interest is not its broad interest in preventing discrimination throughout the economy, but its much weaker, largely illegitimate, interest in regulating religious events.

Requiring petitioner to assist with a religious ceremony also violates the Establishment Clause. Colorado has "in effect required participation in a religious exercise." *Lee v. Weisman*, 505 U.S. 577, 594 (1992). It does not matter that the state or the couple may not understand the wedding as religious. What matters for identifying burdens on religious liberty—especially here, where free-exercise and disestablishment interests overlap—is petitioner's understanding. There is no reason to doubt petitioner's straightforward and widely shared religious understanding of weddings.

III. Colorado's Anti-Discrimination Act, as applied, violates the Free Exercise Clause. It is neither

religion-neutral nor generally applicable. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

A. Colorado protected bakers who cannot in conscience create cakes that denounce same-sex relationships. But Colorado denied protection to petitioner, who cannot in conscience create a cake that celebrates a same-sex wedding. The state court applied flatly inconsistent reasoning to the two claims. This differing treatment cannot be explained on the ground that the message of the other bakers' cakes would be explicit and the message of petitioner's cake implicit. That would not matter to the court's stated logic, and either way, petitioner would be helping to celebrate a wedding he believes is sinful.

B. Neutrality and general applicability are distinct requirements: while non-neutrality focuses on targeting and discrimination, lack of general applicability is shown when the state regulates religious conduct while leaving analogous secular conduct unregulated—even if in only one or a few instances. The question is whether the unregulated "nonreligious conduct ... endangers these [state] interests in a similar or greater degree" than the regulated religious conduct. *Lukumi*, 508 U.S. at 543.

Here the unregulated conduct—refusing to provide a cake denouncing same-sex marriage for a conservative Christian customer—endangers the state's interests as much as the regulated conduct—refusing to create a cake celebrating same-sex marriage for a same-sex couple. Unwillingness to promote a protected group's message either is discrimination or it is not. Sending a customer elsewhere because of disagreement with his requested message inflicts the

same inconvenience, and the same insult, whether the message about same-sex marriage is celebration or condemnation.

C. This unequal protection violates free exercise even though it stems not from an explicit exception for secular conduct but rather from inconsistent interpretation of the law. *Lukumi* found lack of general applicability based on similar sources.

D. Vigorous enforcement of the neutrality and general-applicability requirements is vital to preserving meaningful religious liberty. Exempting secular but not religious interests deprives religious minorities of vicarious political protection. And regulating religious conduct devalues religion as compared to the unregulated secular conduct.

IV. Colorado has no compelling interest in making this small business serve same-sex weddings, especially when it does not equally regulate bakers on the other side of the issue. The customers' material interest in obtaining a cake is not at issue; there were ample willing providers.

The insult or dignitary harm to same-sex couples cannot be considered in isolation. The Court must also consider the dignitary harm to the religious objectors, for whom "free exercise is essential in preserving their own dignity." *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). Those bakers willing to turn away good business for religious reasons believe that they are being asked to defy God's will, disrupting the most important relationship in their lives and tormenting their conscience. Religious liberty is meant to prevent such harms, and they cannot be justified by the desire of same-sex couples

in a pluralistic society never to encounter disapproval. The argument from dignitary harm is ultimately an argument that petitioner's religious practice must be suppressed because its communicative impact offends the customer turned away. That argument conflicts with the whole First Amendment tradition.

The balance of hardships here tilts heavily in favor of petitioner. The same-sex couple who obtains a cake from another baker still gets to live their own lives by their own values, but petitioner does not. He must repeatedly violate his conscience or permanently abandon his occupation.

V. If the Court is in doubt about neutrality and general applicability, it should order briefing to reconsider the rule of *Employment Division v. Smith*, 494 U.S. 872 (1990). That rule will have failed to secure religious liberty if it affords no protection here, where the state has given unequal treatment to conscience on opposite sides of a highly divisive issue. *Smith*'s rule was never briefed or argued, and it has not become embedded in the law. It has been interpreted only in *Lukumi*, which would have come out the same way under any standard. Heightened scrutiny would provide a means to protect the essential interests of both same-sex couples and religious dissenters—in contrast to *Smith*'s rule, which allows imposition of generally applicable law no matter how weak the state's interests or how severe the burden on religious exercise.

ARGUMENT

I. It Is Essential—and Possible—to Protect the Rights of Both Sides in Disputes Between Same-Sex Couples and Wedding Vendors.

In its decision protecting the right of same-sex couples to marry, this Court affirmed that "[t]he Constitution promises liberty to all within its reach," allowing "persons, within a lawful realm, to define and express their identity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015). The Court held that gay and lesbian persons could live out their identity by lawfully marrying someone of the same sex.

Now this Court must hold that religious dissenters from same-sex marriage have the same liberty to live consistently with their identity. An individual who provides personalized services like the creation of customized cakes should not be required to provide them for an event—a wedding—that he believes is inherently religious, and that he believes is sinful because it conflicts with the fundamental nature of marriage as ordained by God. This brief is an appeal to protect these conscientious objectors as well as same-sex couples—to hold fast to the proposition that "[t]he Constitution promises liberty to all within its reach." *Id.*

Obergefell emphasized that the First Amendment guarantees "religious organizations and persons" opposed to same-sex marriage "proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Id.* at 2607. But the Free Exercise Clause "implicates more than just freedom of belief," and more even than the right "to express those beliefs." *Burwell v. Hobby Lobby*

Stores, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). It includes the right to live and act according to those beliefs—to strive "for a self-definition shaped by their religious precepts." *Id.* The very premise of the Religion Clauses is that religion is a central element of personal identity. *Id.* (for believers, "free exercise is essential in preserving their own dignity"); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1853 (2014) (Kagan, J., dissenting) ("A person's response to [religious] doctrine, language, and imagery ... reveals a core aspect of identity—who that person is and how she faces the world.").

In affirming the rights of dissenters from same-sex marriage, this Court held that those rights could not go so far as to "permit the State to bar same-sex couples from marriage." *Obergefell*, 135 S. Ct. at 2607. This logic runs the other way with equal force. Protecting the right of same-sex couples to marry does not require, and should not permit, the state to run roughshod over the rights of "religions, and those who adhere to religious doctrines." *Id.* The competing rights must be carefully defined so that neither right undermines the core of the other.

The very arguments that underlie protection of same-sex marriage also support protection for dissenters' religious liberty. The parallels between the two sets of claims have been elaborated by scholars who work principally on religious liberty[2] and also by

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[2] Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 Nw. J.L. & Soc. Pol'y 206, 212-26 (2010).

scholars who work principally on sexual orientation.[3]

First, both religious believers and same-sex couples argue that a core aspect of their identity is so fundamental that it should be left to each individual, free of all nonessential regulation.

Second, both religious believers and same-sex couples argue that their conduct cannot be separated from their claim of protected legal rights so as to give government *carte blanche* to regulate the conduct. Courts have rejected a distinction between sexual orientation and marital conduct, finding that both the orientation and the conduct that follows from that orientation are central to a person's identity. This protection for conduct as well as orientation is an essential and obvious part of the holding in *Obergefell*, which protected not just sexual orientation, but the extensive and continuing conduct that is essential to a marital relationship. Other courts have been more explicit in discussing the close link between orientation and conduct.[4]

Status and conduct are equally intertwined for the religious believer. "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).

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[3] William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2416-30 (1997).

[4] *See, e.g.*, In re Marriage Cases, 183 P.3d 384, 442-43 (Cal. 2008); Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 438 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 885, 893 (Iowa 2009).

> [B]elievers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things constitutive of their identity.

Douglas Laycock and Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 Va. L. Rev. in Brief 1, 4 (2013). Having extended this respect to same-sex couples, the Court should not deny it to conscientious objectors.

Third, both religious dissenters and same-sex couples seek to live out their identities in all aspects of their lives, including those that are publicly visible. *Obergefell* recognized same-sex couples' right not just to live together in private, but to participate in the public institution of civil marriage. 135 S. Ct. at 2600 ("while *Lawrence* [*v. Texas*, 539 U.S. 558 (2003)] confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there").

Religious believers likewise claim the right to follow their faith, and not just in the "intimate" setting of worship services. They claim the right to live with integrity in the institutions of civil society: the right "to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). This right includes living consistently with that religious definition in their workplaces, where people "spend more of their waking hours than anywhere else except (possibly)

their homes." Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1849 (1992).

Religious exemptions that touch on the commercial sphere must be carefully defined. The government has important interests in ensuring that all persons can participate in the commercial marketplace and that businesses do not "unduly restrict" that participation. *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring). But religious believers too have an interest in participating in commerce, and they do not shed all rights of religious exercise at the entrance to the marketplace. Protection for core elements of that right, like declining to assist a wedding, is not forfeited the instant an individual offers commercial services.

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.

This mutual suspicion and hostility is why it is so difficult to protect the liberty of both sides legislatively. Blue states refuse to protect religious liberty;

red states refuse to enact gay-rights laws.

Constitutional protection of dissenters is an important part of the solution for such deep divides. Constitutional protection allows people of fundamentally differing views to coexist, because they need not fear that their core commitments will be successfully attacked by a hostile majority. *Obergefell* protected same-sex couples when most legislatures would not. 135 S. Ct. at 2605 (constitutional rights apply "even if the broader public disagrees and even if the legislature refuses to act.").

The Religion Clauses reflect similar purposes. James Madison explained how religious liberty went far to cure "the disease" of religious conflict:

> Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State.

Memorial and Remonstrance Against Religious Assessments ¶11 (1785), http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

Resistance to civil marriage or other new rights for same-sex couples will be deepest and longest if religious dissenters perceive an existential threat to their own community. Government can calm the storm by swearing off any such threats, as this Court has long recognized. "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support." *West Virginia State Board of Edu-*

cation v. Barnette, 319 U.S. 624, 636 (1943).

The classically American solution to the problem of deep difference is to protect the liberty of both sides. There is no reason to let either side oppress the other. The right of same-sex couples to civil marriage has been secured. Government should not now force religious dissenters to directly recognize or facilitate same-sex weddings, unless there are compelling reasons to do so—reasons not present here.

II. The Colorado Anti-Discrimination Act, as Applied, Burdens Core Liberties Under Both Religion Clauses.

A. This Case Arises in the Inherently Religious Context of a Wedding.

This is a case about assisting with a wedding. It is not about any alleged right to generally refuse service to same-sex couples or any other class of people. It is not even about an alleged right to act on conscience in purely commercial contexts. It is about a right to act on conscience in a religious context—in connection with a wedding. The Court need go no further than that to decide this case.

Marriage is both a legal relationship and a religious relationship. And despite America's commitment to separation of church and state, the legal and religious relationships are deeply intertwined. Clergy perform ceremonies that create civil marriages as well as religious marriages. Civil courts grant divorces that end religious marriages as well as civil marriages. Some faiths require a separate religious proceeding to end the religious marriage, but most do not. When Americans describe themselves as married, single, or

divorced, they rarely distinguish the legal relationship from the religious.

For many Americans, including petitioner, the religious relationship is primary: civil marriage rests on the foundation of religious marriage. The state can recognize and implement marriage, but marriage remains fundamentally religious. A wedding is therefore an inherently religious ceremony. Even if the couple thinks of their marriage and wedding in wholly secular terms, for believers like petitioner, the wedding creates and celebrates an inherently religious relationship.

Jack Phillips, the individual petitioner, professed this fundamentally religious understanding of marriage. J.A. 157-58. He understands marriage as rooted in the story of Adam and Eve; in Christian scripture explaining the relationship between Christ and the church by analogy to the relationship between husband and wife; and in the words of Jesus, who was invoking Jewish scripture:

> [F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother and be united with his wife and the two will become one flesh. So they are no longer two, but one. Therefore, what God has joined together, let not man separate.

Id. (quoting *Mark* 10:6-9 (paraphrasing *Genesis* 2:24)).

Because of his religious understanding of marriage, petitioner will not create a wedding cake for a religiously prohibited marriage. He serves people of all races, faiths, and sexual orientations. J.A. 164. Apart from a wedding, he would create any of his

baked goods for the individual respondents or any other same-sex couple. J.A. 169.

But the wedding is different. "*It has everything to do with the nature of the wedding ceremony itself*, and about my religious belief about what marriage is and whether God will be pleased with me and my work." J.A. 167 (emphasis added). "The issue was the nature of the event and that I cannot participate in such a ceremony based on my sincerely held religious beliefs." *Id.*

Petitioner's job is to make his part of the wedding the best and most memorable it can be. He is assisting and promoting the celebration of the marriage. Petitioner's normal process involves "consultation with the customer(s) in order to get to know their desires, their personalities, their personal preferences and learn about their wedding ceremony and celebration" and thereby "design the perfect creation for the specific couple." J.A. 161. And therefore, "I am an important part of the wedding celebration for the couple, and my creations are a central component of the wedding. By creating a wedding cake for the couple, I am an *active* participant and I am associated with the event." J.A. 162 (emphasis in original).

B. In This Inherently Religious Context, Petitioner's Interest in Religious Liberty Is Strong, and the State's Interest in Regulation Is Weak.

Respondents portray this case as simply about economic regulation of a commercial business, where individual rights are at a minimum and the state's power to regulate is at a maximum. But Colorado here demands not just any commercial transaction; it de-

mands that petitioner assist with a religious ceremony.

1. Religious liberty is not unprotected even in large commercial entities. *Hobby Lobby*, 134 S. Ct. 2751. But the more religious the context, the greater the interest in religious liberty and the lesser the state's interest in regulation. This is why Colorado explicitly exempts any "church, synagogue, mosque, or other place that is principally used for religious purposes." Colo. Rev. Stat. §24-34-601(1).

The state and the court below failed to comprehend that a wedding is also a religious context. Colorado demands that petitioner assist and celebrate an event that he understands to be both inherently religious and religiously prohibited. It demands that he assist with what he understands to be a sacrilege. This clearly burdens free exercise. And the state's countervailing interest is not its broad interest in preventing discrimination throughout the economy, but its much weaker, largely illegitimate, interest in regulating religious events.

2. Requiring petitioner to assist with an event he understands as religious also violates the Establishment Clause. In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court held that when a public school called on persons to stand silently for a brief prayer at graduation, it "in effect required participation in a religious exercise," thus violating the Establishment Clause. *Id.* at 594. The Court found that a "reasonable dissenter" could view the coerced act of standing, or even just remaining silent, as participation in the prayer. *Id.* at 593.

The coercion on petitioner here is unquestioned: a

governmental order that he either create cakes for weddings he believes are sinful or stop creating wedding cakes altogether. Pet. App. 57a. And here, as in *Weisman*, a "reasonable dissenter" could view the coerced act of creating and providing a cake as participation in the wedding.

3. It does not matter that the wedding cake is served at the reception rather than the wedding itself, or that the state or the couple may not understand the wedding as religious. What matters for identifying burdens on religious liberty is the religious claimant's understanding. That good-faith understanding is entitled to substantial deference—not absolute deference, but substantial. There is no reason to doubt petitioner's straightforward and widely shared religious understanding of weddings.

For petitioner, the wedding is a religious event, and the reception and his cake are a "central component of the wedding." J.A. 162. He will serve same-sex couples, but not same-sex weddings. J.A. 169. As in *Thomas v. Review Board*, petitioner "drew a line, and it is not for us to say that the line he drew was an unreasonable one." 450 U.S. 707, 715 (1981). *Accord Hobby Lobby*, 134 S. Ct. at 2778.

When government requires a dissenting individual to support a wedding, free exercise and nonestablishment protections overlap and reinforce each other. The Court has repeatedly invalidated laws that violate these mutually reinforcing rights. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 181 (2012) ("[b]oth Religion Clauses" require ministerial exception to nondiscrimination laws); *Larson v. Valente*, 456 U.S. 228, 244-45 (1982) (both clauses forbid denominational prefer-

ences); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976) ("First Amendment"—not one Religion Clause or the other—limits judicial "resolution of religious controversies").

III. The Colorado Anti-Discrimination Act, as Applied, Is Neither Neutral Nor Generally Applicable.

A. Colorado Protects Other Bakers' Claims of Conscience, But Not Petitioner's.

Petitioner cannot in conscience create a cake to celebrate a same-sex wedding. His refusal to create such a cake was held to violate Colorado law, and Colorado refused to protect his claim of conscience.

Other owners of bakeries cannot in conscience create cakes that denounce same-sex relationships. Their refusal to create a cake with such a scriptural quotation was held *not* to violate Colorado law—and therefore, their claim of conscience was protected.

This unequal treatment of conscience, discriminating between squarely opposite sides of a deeply divisive moral issue, is neither neutral nor generally applicable.

The court of appeals rationalized this unequal treatment in a footnote. Pet. App. 20a n.8. It said that petitioner's objection to the message he said his cake would send—his confessed "opposition to same-sex marriage"—discriminated against the same-sex couple that wanted him to send that message. *Id.* The protected bakers also objected to "the offensive nature of the requested message," but the court said that refusing to make a cake with that message did *not* discriminate against the very conservative Christian

requesting that message. *Id.* The court of appeals reached this conclusion even though Colorado prohibits discrimination on the basis of "all aspects of religious beliefs, observances or practices ... as well as the beliefs or teachings of a particular religion, church, denomination or sect." 3 Colo. Code Regs. §708-1:10.2(H).

The protected bakers' willingness to produce cakes with other "Christian themes" for other Christian customers was treated as exonerating. Pet. App. 20a n.8. Petitioner's willingness to produce other cakes and baked goods for respondents and other same-sex couples was treated as irrelevant. *Id.* at 19a.

For the protected bakers, the court assumed that the message would be the bakers' message and not the customer's; the bakers could lawfully object to "the offensive nature of the requested message." *Id.* at 20a n.8. For petitioner, the court said that his cake would send no message, but if it did send one, it would be the customer's message, not the baker's. *Id.* at 30a.

For petitioner, the fact that he would merely be complying with the law meant that he would send no message. *Id.* at 30a-31a. For the other bakers, this argument went unmentioned.

The court also said that in the cases it distinguished, the customer wanted objectionable words on the cake, and that in petitioner's discussion with the individual respondents he did not learn what they wanted on their cake. *Id.* at 28a, 35a. But petitioner could surely assume that they wanted *some* words or symbols on the cake, and an essential part of his task was to help them choose those words and symbols. J.A. 161. In any event, the very purpose of a

wedding cake is to celebrate the wedding and the marriage, with or without an inscription.

And under the court's reasoning, the case would have come out the same way even if the conversation had lasted longer and the couple had said they wanted two men in tuxedos, "David ♥ Charlie," a rainbow, or any other more explicit message. The court's logic would still have said that it would be the customer's message, not petitioner's; that petitioner would merely be doing what the law required; and that refusing to produce this message discriminated on the basis of sexual orientation.

Even if the court's alleged distinctions were more persuasive, and even if they succeeded in placing the two sets of bakers in different doctrinal categories under state law, that would not change the bottom line. The conscience of bakers who support same-sex marriage, or refuse to oppose same-sex marriage, is protected. The conscience of bakers who object to same-sex marriage is not protected.

This discrimination is like the ordinance in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where racial epithets were illegal, but "racist," "bigot," and a vast range of other offensive epithets were permitted. State law placed the two sets of epithets in different doctrinal categories, and the correlation between epithets hurled and speakers regulated was imperfect. But these distinctions could not save a regime that effectively "license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392. It is no more defensible here to allow one side to follow the dictates of conscience while requiring the other side to submit its conscience to the demands of any customer

who walks in the door.

B. A Law That Burdens the Free Exercise of Religion Is Not Generally Applicable Unless It Applies to All or Substantially All Analogous Secular Conduct.

The current understanding of the Free Exercise Clause derives from two cases with facts at opposite ends of a continuum—*Employment Division v. Smith*, and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). *Smith* upheld the epitome of a generally applicable law—an "across-the-board criminal prohibition." 494 U.S. at 884. *Lukumi* struck down a system of city ordinances gerrymandered to such an extreme degree that they applied to "Santeria adherents but almost no others." 508 U.S. at 536. In the quarter century since *Lukumi*, this Court has provided no further guidance.

Smith and *Lukumi* stand at opposite ends of a broad range. Many cases fall in the middle, involving laws that regulate religious conduct, regulate some analogous secular conduct, and exempt or simply fail to reach other analogous secular conduct. These laws treat the exercise of religion unequally as compared to the analogous but unregulated secular conduct.

The Free Exercise Clause protects "religious observers against unequal treatment." *Id.* at 542. If a law burdens the free exercise of religion and leaves analogous secular conduct unregulated, it is not a generally applicable law. The inequality need not be nearly as extreme as in *Lukumi*. When carefully read, *Smith* and *Lukumi* make clear that even narrow secular exceptions make a law less than generally applicable. *See* Douglas Laycock and Steven T. Collis,

Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1 (2016).

1. Neutrality and General Applicability Are Independent Requirements with Distinct Content.

Smith said that if a law is not neutral, or not generally applicable, it must be justified under the compelling-interest test as before. 494 U.S. at 884 (reaffirming *Sherbert v. Verner*, 374 U.S. 398 (1963)).

Lukumi addressed neutrality and general applicability as distinct requirements, in separately enumerated sections of the opinion. The ordinances were not neutral, because they "target[ed]" Santeria, their "object" was to suppress Santeria sacrifice, and they were "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings." 508 U.S. at 542. These words—target, targeting, object, and gerrymander—are pervasive in the neutrality section of the opinion. *Id.* at 532-42. But they do not appear even once in the general-applicability section. *Id.* at 542-46.

The neutrality section also uses words like "discriminate," "discrimination," and "because of" religion. "*At a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532 (emphasis added). But those words are also entirely absent from the general-applicability section.

General applicability is a distinct requirement. General applicability addresses objectively unequal treatment of religious and secular practices, regard-

less of targeting, motive, or an improper object.

The distinctions in the opinion below fail the test of neutrality; they target petitioner and avoid regulating bakers on the other side of the marriage issue. Even more clearly, the law as applied fails the test of general applicability.

2. To Be Generally Applicable, a Law Must Treat Religious Conduct as Well as It Treats Analogous Secular Conduct.

a. Because the "across-the-board criminal prohibition" in *Smith* so clearly was generally applicable, 494 U.S. at 884, the Court did not explicitly define the boundaries of general applicability. But *Smith*'s understanding of that requirement appears from the Court's analysis of its earlier cases on unemployment compensation: *Sherbert v. Verner*, 374 U.S. 398, and *Thomas v. Review Board*, 450 U.S. 707. *Sherbert* and *Thomas* applied compelling-interest review to unemployment-compensation statutes that denied benefits to claimants who refused work that conflicted with their religious practices.

Smith reaffirmed these precedents, explaining that strict scrutiny applied because the unemployment-compensation law allowed individuals to receive benefits if they refused work for "good cause," thus creating "individualized exemptions" from the requirement of accepting available work. 494 U.S. at 884. Individualized exemptions are one way in which a law can fail to be generally applicable.

More specifically, the statute in *Sherbert* was not generally applicable because it allowed "at least some" exceptions. *Smith*, 494 U.S. at 884. There are not

many acceptable reasons for refusing work and claiming a government check instead, but there were "at least some," and therefore, the state also had to recognize religious exceptions.

b. The Court elaborated on its new standard in *Lukumi*, striking down Hialeah's ordinances that prohibited the killing of animals only when the killing was unnecessary, took place in a ritual or ceremony, and was not for the primary purpose of food consumption. 508 U.S at 535-37.

Lack of general applicability in *Lukumi* was shown in multiple ways: narrow prohibitions of selected conduct and categorical and individualized exemptions for analogous secular conduct, *id.* at 543-44, resulting in failure "to prohibit nonreligious conduct" that endangered the city's interests "in a similar or greater degree than Santeria sacrifice," *id.* at 543.

c. A law need not be nearly as bad as the ordinances in *Lukumi* to fail the test of general applicability. This Court explicitly identified *Lukumi* as an extreme case. The ordinances fell "well below the minimum standard necessary to protect First Amendment rights." 508 U.S. at 543. It was therefore unnecessary to "define with precision the standard used to evaluate whether a prohibition is of general application." *Id.* But *Smith*'s explanation of *Sherbert* shows that even one or a few secular exceptions can make a law less than generally applicable.

Lower courts that have read these opinions carefully understood this. Laycock and Collis describe cases from four federal courts of appeals, the Iowa Supreme Court, the Virginia Court of Appeals, and federal district courts in two more circuits, all holding

that laws with one or only a few secular exceptions are not neutral or not generally applicable. See 95 Neb. L. Rev. at 19-23.

d. The requirement that analogous religious and secular conduct be treated equally depends on the identification of analogous secular conduct. This Court was clear on what makes religious and secular conduct analogous: that the "nonreligious conduct ... endangers these [state] interests in a similar or greater degree" than the burdened religious conduct. *Lukumi*, 508 U.S. at 543.

Colorado's interest here is in protecting minority groups who have suffered discrimination in the past—whether sexual or religious minorities—from being discriminated against in the future by vendors who conscientiously object to assisting their activities. Unwillingness to promote a message associated with a protected group either is discrimination or it is not. The message conveyed by a cake is either the baker's message or the customer's message, but the answer to that question cannot depend on whether the court agrees with the message. Sending a customer elsewhere because of disagreement with his requested message inflicts the same inconvenience, and the same insult, whether the message is promotion of same-sex marriage or hostility to same-sex marriage. *See infra* at 33-34. Amici think the consciences of both sets of bakers should be protected. But whatever rule the state adopts must be applied consistently. When it is not, the resulting law is not generally applicable.

C. Secular Exceptions Need Not Be Stated in the Law's Text or Explicitly Formulated as Exceptions.

Unequal treatment of religious and secular conduct requires strict scrutiny, however that inequality emerges. *Lukumi* expressly rejected the city's contention that judicial "inquiry must end with the text of the law at issue." 508 U.S. at 534. In addition to parsing the ordinances' text, the Court reviewed an array of other sources to identify analogous secular conduct exempted or left unregulated. *See id.* at 526, 537, 539, 544-45 (considering numerous sections of Florida statutes).

The city's failure to prohibit fishing, *id.* at 543, and its failure to regulate the disposal of garbage from restaurants, *id.* at 544-45, each tended to show that the ban on animal sacrifice was not generally applicable. There were no explicit exceptions for fishing or restaurant dumpsters; there was just a narrow prohibition that failed to reach them. Disposal of restaurant garbage did not even involve the killing of an animal. But it caused one of the problems that the city professed to be concerned about with respect to animal sacrifice. It was analogous because it implicated the same government interest, not because it was literally the same conduct.

Unequal application of a law can also emerge from interpretation. One element of the *Lukumi* ordinances turned on whether a killing was "unnecessary." The city said that religious killings of animals were unnecessary, but judicial precedent said that using live rabbits to train greyhounds was *not* unnecessary. This unequal interpretation, protecting greyhound racetracks but not religion, showed that the ordinances

failed neutrality. *Id.* at 537-38. *A fortiori*, they failed general applicability.

The distinction in the court below is similar: the court found petitioner's act of conscience subject to the statute and other bakers' acts of conscience not subject to the statute. However the court reached this conclusion, the result was unequal application of the law, leaving the law neither neutral nor generally applicable.

D. There Are Important Reasons for Strictly Interpreting the General-Applicability Requirement.

These rules about the general-applicability requirement, including the rule that a single secular exception can defeat general applicability, are deeply rooted in the requirement's underlying rationale.

1. The requirement of generally applicable law is an application of Justice Jackson's much quoted observation that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). Regulation that "'society is prepared to impose upon [religious groups] but not upon itself'" is the "precise evil ... the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545-46 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

Religious minorities will rarely have the political clout to defeat a burdensome law or regulation. But if that law also burdens other, more powerful interests,

there will be stronger opposition and the law is less likely to be enacted in its burdensome form. Burdened secular interests provide vicarious political protection for religious minorities.

Even narrow secular exceptions rapidly undermine this vicarious protection. If secular interest groups burdened by a law are exempted, they have no reason to oppose the law, and religious minorities are left standing alone. If Colorado treated all claims of conscience equally—if the price of refusing to protect petitioner were to protect no one, and to require all bakers to create cakes with messages they profoundly oppose—the political balance between individual conscience and non-discrimination law would be very different.

2. When religious conduct is regulated and analogous secular conduct is not, the state implies a value judgment about religion. The religious conduct is more objectionable, less deserving of protection, not important enough to overcome the state's regulatory interests, as compared to the protected secular conduct. In *Lukumi*, this Court said that the city "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." 508 U.S. at 537. This finding of a "value judgment" about religion also appears in *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004), and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.), each involving burdensome regulation of religion and a single secular exception.

This negative value judgment about religion is obvious in the opinion below—in its strained efforts to distinguish bakers on opposite sides of the issue, in its

inconsistent answers to the same questions when posed about one set of bakers and the other, and in its explicit statements. The court accepted that the religious anti-gay customer had requested a "message" of an "offensive nature." Pet. App. 20a n.8. But it analogized petitioner's sincere religious faith to hostility so obviously "irrational" that it could only be a pretext for discrimination. *Id.* at 19a. The opinion contains no hint of the respect this Court expressed for the "decent and honorable religious or philosophical premises" that lead some Americans to dissent from same-sex marriage. *Obergefell*, 135 S. Ct. at 2602.

IV. Colorado Has No Compelling Interest in Making This Small Business Serve Same-Sex Weddings.

1. A law that burdens the free exercise of religion and is not neutral, or not generally applicable, "will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546. Colorado must show a compelling interest *in discriminating*—in requiring petitioner to violate his conscience when it does not require bakers on the other side of the issue to violate their conscience. It is hard to imagine what such an interest could be.

Moreover, Colorado must make this showing as applied to this case and those that cannot be distinguished from it. What is relevant is not the state's general interest in preventing discrimination or protecting same-sex couples, but its interest in compelling this small owner-operated business to participate in weddings in violation of the owner's conscience. The question is not whether Colorado has a

compelling interest in some other case, but whether it has a compelling interest in this case.

Thus in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court did not ask whether Wisconsin had a compelling interest in education, but whether it had a compelling interest in one or two additional years of formal education for Amish children. *Id.* at 221-22. In *Sherbert*, the issue was not the state's general interest in encouraging claimants to accept available work, but its particular interest in those claiming religious reasons for refusing particular jobs. *See* 374 U.S. at 406-07, 409-10. Nothing in *Smith* or *Lukumi* questions this aspect of *Sherbert* and *Yoder*. *See also Gonzales v. O Centro Espirita*, 546 U.S. 418, 430-32 (2006) (explaining how the Religious Freedom Restoration Act's focus on the individual claimant is rooted in earlier constitutional cases, especially *Sherbert* and *Yoder*).

2. There are two state interests potentially at issue when a customer is turned away on grounds of conscience. One is the customer's material interest in obtaining a cake. Such an interest might be compelling when actually at issue, but it is inconceivable that it was at issue in metropolitan Denver. In fact, the individual respondents promptly accepted an offer of a free wedding cake. J.A. 184-85.

Second, same-sex couples complain of the insult and dignitary harm of being turned away because of the first vendor's moral or religious disapproval. This emotional harm is real, but it cannot be considered in isolation. The Court must also consider the dignitary harm to the religious objectors, for whom "free exercise is essential in preserving their own dignity." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concur-

ring).

Those bakers willing to turn away good business for religious reasons believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates. They believe that they are being asked to do serious wrong that will torment their conscience for a long time after. Petitioner said he would be "dishonoring" and "displeasing" "the sovereign God of the universe." J.A. 158-59. These are among the harms religious liberty is intended to prevent, and the customer's sense of being rejected or disapproved of cannot justify inflicting such harms.

Viewed in purely secular terms, we have intangible emotional harms on both sides of the balance. The emotional harm to same-sex couples cannot compellingly outweigh the emotional harm to believers. Reciprocal moral disapproval is inherent in a pluralistic society; the desire of same-sex couples never to encounter such disapproval is not a sufficient reason to deprive others of religious liberty.

The argument from dignitary harm to individuals is, at bottom, an argument that petitioner's religious practice must be suppressed because it offends the customer turned away. That argument is at odds with the whole First Amendment tradition. It is settled that offensiveness is not a compelling interest that can justify suppressing speech. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2531-32 (2014) (abortion counseling); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (flag burning); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-57 (1988) (intentional infliction of emotional distress); *Cohen v. California*, 403 U.S. 15, 18-26 (1971) (profanity).

These amici are discussing petitioner's free-exercise claim, not his free-speech claim. But that does not change the fact that any dignitary harm here flows solely from the communicative impact of his religious practice. And because the law regulating that practice is not neutral and generally applicable, his conduct is also protected under the compelling-interest test. The speech cases say that offensiveness or insult cannot satisfy that test. Dignitary harm is no more compelling in a free-exercise case than in a free-speech case.

3. But there is more. There is an objective way in which the balance of hardships tilts heavily in favor of petitioner. Couples who obtain their cake from another baker still get to live their own lives by their own values. They will still celebrate their wedding, still love each other, still be married, and still have their occupations or professions.

Petitioner does not get to live his own life by his own values. He must repeatedly violate his conscience, making wedding cakes for every same-sex couple who asks, Pet. App. 57a, or he must abandon his occupation. The harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation. This permanent harm is far greater than the one-time dignitary harm on the couple's side.

Forcing petitioner to choose between his business and his conscience is an historic means of religious persecution. In eighteenth-century Ireland, it was generally illegal for a Catholic to keep more than two apprentices.[5] In both England and Ireland, anyone

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[5] An Act for explaining and amending an Act intituled, An Act to prevent the further growth of popery, 8 Anne, c. 3, §37

holding a civil or military office, or receiving pay by reason of a royal grant, or any schoolmaster, barrister, solicitor, or notary, was required to take an anti-Catholic oath.[6] These and other examples were recent history to the Founders.

The Free Exercise Clause must be understood at least to address historically familiar means of religious persecution. Where the choice between faith and occupation is imposed by a law that is not neutral, or not generally applicable, no mere expressive interest on behalf of customers can justify it. Neither of Colorado's interests is sufficiently compelling to justify permanent loss of identity or occupation.

4. And neither of these interests can begin to justify Colorado's discrimination between petitioner and bakers who refuse to make cakes opposed to same-sex marriage. In each case, the customer is turned away and has to find another baker.

In each case, the customer is turned away because the baker finds his request immoral and offensive, and refuses to actively assist with it. The dignitary harm to the customer turned away is the same in either case. The difference is that the court of appeals sympathized with the customers petitioner turned away, and it did not sympathize with the customer the

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(1709), in 4 *Statutes at Large, Passed in the Parliaments Held in Ireland* 190, 214 (Dublin, Boulter Grierson 1765).

[6] An Act for preventing Dangers which may happen from Popish Recusants, 25 Car. II, c.2, §§ 2, 8 (1673), in 5 *Statutes of the Realm* 782, 783-84 (Hein 1993); An Act for the further Security of His Majesties Person, 13 & 14 Wm. III, c.6, §2 (1701), in 7 *id.* 747, 748; An Act for Enlarging the Time for taking the Oath of Abjuration, 1 Anne, stat. 2, c. 21, §5 (1702), in 8 *id.* 218, 219.

other bakers turned away.

Moreover, petitioner's objection is confined to weddings. The other bakers' objection was not so confined. Colorado actually has a broader interest in the case of the unregulated bakers than in petitioner's case.

Neither of the interests potentially at issue here are compelling, and neither can begin to justify the discrimination between petitioner and the other bakers.

V. If the Court Is Unsure Whether This Law Is Neutral and Generally Applicable as Applied, Then *Employment Division v. Smith* Should Be Reconsidered.

Neutrality and general applicability are now threshold questions in every free-exercise case. They are often complicated questions that have divided the lower courts. As in *Lukumi*, governments routinely claim that every law is neutral and generally applicable, no matter how discriminatory it may be in practice.

Colorado has protected the consciences of one set of bakers, and refused to protect the consciences of another set of bakers, who are squarely on opposite sides of the same divisive question. If the Court is open to the possibility that such a law can be rationalized as neutral and generally applicable, then *Smith* and *Lukumi* have failed as a means of protecting the free exercise of religion. In that event, *Smith*'s holding that the Free Exercise Clause does not protect against neutral and generally applicable laws should be reconsidered.

As Justice Souter once explained, there are many reasons to reconsider this part of *Smith*, beginning with the fact that the rule there announced was neither briefed nor argued. *Lukumi*, 508 U.S. at 571-77 (1993) (Souter, J., concurring in the judgment).

Time has passed, but *Smith* has not become embedded in the law. *Smith*'s rule about generally applicable laws has been interpreted only in *Lukumi*, which would have come out the same way under any standard. *Smith* was merely a background assumption in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which interpreted a different clause of the Constitution.

Smith was not at issue in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), or *Locke v. Davey*, 540 U.S. 712 (2004). No one claimed that intentional exclusion of religion was neutral and generally applicable; the issue was whether the Free Exercise Clause applies to funding in the same way it applies to regulation.

Smith was not applied in *Hosanna-Tabor*, 565 U.S. 171, which was decided under a separate doctrine about internal church governance. Nor was *Smith* applied in *Holt v. Hobbs*, 135 S. Ct 853 (2015), *Hobby Lobby*, 134 S. Ct. 2751, or *O Centro*, 546 U.S. 418, all decided under federal religious-liberty legislation.

These are all the significant free-exercise decisions since *Smith*. The Court's remaining citations to *Smith* are little more than passing references and occasional cursory resolutions of secondary issues left unexplored. It is not too late for full briefing and argument on the unprotective part of the rule in *Smith*.

Heightened scrutiny of laws burdening the free

exercise of religion would provide a means of protecting the essential interests of both same-sex couples and religious dissenters. *Smith* appears to mean that if a rule is generally applicable, government can refuse religious exemptions whether or not it has a plausible reason, or any reason at all. A rule of law that takes account of the weight of the competing constitutional interests would do justice more often than a rule that ignores those interests.

The Court should not repeat its original mistake of deciding the reach of the Free Exercise Clause without full briefing and argument. If the Court is in doubt about neutrality and general applicability on these facts, it should order briefing on the underlying issue in *Smith*.

But that should not be necessary in this case. The law at issue is not neutral, and it is not generally applicable. It must therefore satisfy strict scrutiny, and it cannot.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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APPENDIX

Individual Statements of Interest

Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors founded in 1963 and dedicated to the defense of religious freedom. For four decades, CLS has sought to protect all citizens' free exercise and free speech rights, both in this Court and in Congress.

The decision below directly threatens the freedoms of religious exercise and expression that are essential to a free society. Our Republic will prosper only if the First Amendment rights of all Americans are protected, regardless of the current popularity of their religious exercise and expression. For that reason, CLS was instrumental in passage of the Equal Access Act, 20 U.S.C. §§ 4071-4074 ("EAA"), which for more than thirty years has protected both religious and LGBT student groups' right to meet on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting EAA); *Board of Education v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student group); *Straights and Gays for Equality v. Osseo Area School No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student group).

Center for Public Justice ("CPJ") is an independent, nonpartisan Christian civic education and public policy organization that works with a wide range of Christian citizens, leaders, churches, and faith-based organizations, to help Christians understand God's good purposes for government.

CPJ's mission is to equip citizens, develop leaders, and shape policy to advance public justice. CPJ seeks to enhance the quality, integrity, and vitality of American life through ensuring that government respects and protects the diversity of convictions held within society. CPJ works towards a civil society in which organizations that express religious diversity have their essential character protected and their freedom to serve enhanced. CPJ works to make space (both in policy and in public attitudes) for the diversity of faith-based organizations to contribute freely to the welfare of civic life, while at the same time upholding the ability for those with differing convictions to receive respect and the protections due to all members of the political community.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with nearly sixteen-million members worldwide. Fundamental Church doctrine holds that "marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children." The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World* (Sept. 23, 1995). The Church also believes in "obeying, honoring, and sustaining the law," Article of Faith 12, and therefore accepts that under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), same-sex marriage is now the law of the land. This acknowledgment of civil law does not change the Church's doctrine, teachings, practices, or policies regarding marriage.

Believing in basic fairness for all, the Church has openly encouraged and participated in legislative efforts to secure essential rights for LGBT citizens

while protecting religious freedom. The Church's support was instrumental in passing the Utah legislation that received nationwide acclaim as a possible model for resolving the standoff between religious freedom and LGBT rights. *See Utah Passes Antidiscrimination Bill Backed by Mormon Leaders* (March 12, 2015), at https://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?mcubz=3. When religious and LGBT interests conflict, the Church advocates civility, protection of core rights for all, and reasonable compromise, with the goal being pluralism rather than domination by either side. The Church joins this brief out of a conviction that this Court must rigorously protect basic First Amendment rights to free speech and the free exercise of religion to safeguard the conditions that make such pluralism possible.

The Lutheran Church—Missouri Synod ("the Synod") has some 6,100 member congregations with 2,100,000 baptized members throughout the United States. The Synod has two seminaries, ten universities, numerous related Synod-wide corporate entities, hundreds of recognized service organizations, and the largest Protestant parochial school system in America. The Synod steadfastly adheres to orthodox Lutheran theology and practice, and among its beliefs are the Biblical teachings that marriage is a sacred union of one man and one woman (*Genesis* 2:24-25), and that God gave marriage as a picture of the relationship between Christ and His bride the Church (*Ephesians* 5:32). As a Christian body in this country, the Synod believes it has the duty and responsibility to speak publicly in support of the religious liberty of all, including the right of the petitioner, who, based on his sincerely-held religious beliefs, declined to create

a cake to celebrate a same-sex marriage. The Synod has a keen interest in this Court fully protecting all rights under the Establishment and Free Exercise Clauses of the First Amendment.

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves forty member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that God has ordained marriage as the most basic unit for the building of earthly societies, and that the union is alone reserved for the joining of one man and one woman.

Queens Federation of Churches was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.

Rabbinical Council of America ("RCA") plays an integral role in Jewish life around the world. The thousand members of the RCA serve as congregational rabbis, community organizers, academics, youth and outreach professionals, and chaplains in the military, prisons, and health care systems. The RCA was active in the United States civil rights movement and fought for the legal accommodation of

Shabbat observance in the United States. In addition, the RCA's members build and sustain Jewish schools, synagogues, and centers throughout the United States, and the RCA often represents North American Orthodox Jewry in its relations with American government officials and other bodies.

Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly a thousand congregations across the United States. The Orthodox Union, through its OU Advocacy Center, has participated in many cases before this Court that, like this one, raise issues of critical importance to the Orthodox Jewish community, including *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014); *Locke v. Davey*, 540 U.S. 712 (2004); and *Zelman v. Simmons- Harris*, 536 U.S. 639 (2002).

The Orthodox Jewish community is a minority faith community in the United States. The Constitution's guarantees of religious liberty have been the indispensable foundation upon which our community's members and institutions have been able to grow and flourish in the United States. The Orthodox Union thus has a strong interest in this Court's reversal of the decision below. In this case, the Court will establish the balance between civil rights claims for some Americans in relation to the religious liberties of others. The continued ability of minority faith adherents to observe their religion's demands in this pluralistic society hangs in the balance.